IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 77-11

SHELL OIL COMPANY,
Appellant,

v.

MARVIN MANDEL,
Governor of the State of Maryland, *et al.*,
Appellees.

On Appeal from the Court of Appeals of Maryland

JURISDICTIONAL STATEMENT

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On Appeal from the Court of Appeals of Maryland

JURISDICTIONAL STATEMENT

Appellant Shell Oil Company ("Shell") appeals from the judgment of the Court of Appeals of Maryland, entered on February 18, 1977, petition for reconsideration denied on April 13, 1977. The judgment of the Maryland Court of Appeals was a consolidated ruling on the appeals of Shell, Exxon Corporation, Continental Oil Company, and its subsidiary Kayo Oil Company, Gulf Oil Corporation, Phillips Petroleum Company, Ashland Oil Company, and Commonwealth Oil Refining Company, Inc. and its subsidiary Petroleum Marketing Corporation in an opinion captioned below as *Governor of the State of Maryland, et al.* v. *Exxon Corporation, et al.* These addi-

tional companies may be adversely affected by the Court's resolution of Shell's appeal. Shell submits this Statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that substantial federal questions are presented.

OPINIONS BELOW

The opinion of the Circuit Court for Anne Arundel County, Maryland, granting Shell's motion for partial summary judgment on the issues presented for this Court's review, is not reported officially, but is reported unofficially at 1976-1 CCH Trade Cas. ¶ 60,704 (Md. Cir. Ct. 1975) and is reproduced in the accompanying Appendix C at 49a.[1] The opinion of the Circuit Court for Anne Arundel County on the trial of other issues is not reported, but is reproduced in the accompanying Appendix D at 53a. The opinion of the Court of Appeals of Maryland on all issues decided by the Circuit Court is reported at 279 Md. 410, 370 A.2d 1102 (1977), and is reproduced in the accompanying Appendix A at 1a. The supplemental opinion of the Court of Appeals on motions for reconsideration is reported at 279 Md. 456, 372 A.2d 237 (1977), and is reproduced in the accompanying Appendix B at 45a.

JURISDICTION

Shell brought suit in the Circuit Court for Anne Arundel County, Maryland, seeking a declaration pursuant to Section 3-403 of the Maryland Uniform Declaratory Judgments Act that Chapter 854 of the Laws of Maryland of 1974, as amended, is contrary to the Maryland

[1] Separate appeals and jurisdictional statements will be filed by Shell, Exxon Corporation and Phillips Petroleum Company, Gulf Oil Corporation, Ashland Petroleum Company and Commonwealth Oil Refining Company, Inc. and its subsidiary Petroleum Marketing Corporation, and Continental Oil Company and its subsidiary Kayo Oil Company. Each of the above-named appellants have joined in the filing of a joint appendix.

and United States Constitutions and to obtain an injunction barring enforcement of Chapter 854 by defendant state officials.

In its opinion filed February 18, 1977, the Court of Appeals of Maryland found for defendants. On April 13, 1977, the Court of Appeals denied the motions for reconsideration and stay of mandate timely filed by Shell and other plaintiffs and issued its mandate. Notice of this appeal was filed with the Clerk of the Maryland Court of Appeals and the Clerk of the Circuit Court for Anne Arundel County, the latter of which is possessed of the record, on June 23, 1977. (App. E 143a-146a).

The jurisdiction of the Supreme Court to hear this appeal rests upon 28 U.S.C. § 1257(2) (1970). The following cases sustain the appellate jurisdiction of the Supreme Court to review the judgment of the Maryland Court of Appeals in this case: *Reconstruction Finance Corp.* v. *Beaver County*, 328 U.S. 204 (1946); *First National Bank of Guthrie Center* v. *Anderson*, 269 U.S. 341 (1926); *Dickinson* v. *Stiles*, 246 U.S. 631 (1918).

STATUTES INVOLVED

For purposes of this appeal, the statutes involved are Paragraph D of Chapter 854, 1974 Maryland Laws, codified as Md. Ann. Code, art. 56 § 157E(d), Vol. 5B, pp. 42-43 (Supp. 1976) (hereinafter "Paragraph D"), and Section 2(a) and Section 2(b)'s "meeting the equally low price of a competitor" provision of the federal Clayton Act as amended by the Robinson-Patman Act, 15 U.S.C. § 13(a), (b) (1970) (hereinafter "Robinson-Patman Act"). Maryland's Paragraph D provides:

> Every producer, refiner, or wholesaler of petroleum products supplying gasoline and special fuels to retail service station dealers shall extend all voluntary allowances uniformly to all retail service station dealers supplied.

Section 2(a) of the Robinson-Patman Act provides in pertinent part:

> It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, . . . and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them . . . .

The "meeting the equally low price of a competitor" provision of Section 2(b) of the Robinson-Patman Act provides:

> Provided, however, That nothing herein contained shall prevent a seller rebutting the prima facie case thus made by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor.

QUESTIONS PRESENTED

1. Whether Paragraph D of Chapter 854 of the Laws of Maryland 1974 is in conflict with the federal Robinson-Patman Act (15 U.S.C. § 13) and is thus void under the Supremacy Clause of the United States Constitution where compliance with both Paragraph D and the federal Act is impossible for a supplier of petroleum products in Maryland.

2. Whether Paragraph D of Chapter 854 of the Laws of Maryland 1974 is in conflict with the federal Robinson-

Patman Act and is thus void under the Supremacy Clause of the United States Constitution where Paragraph D stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress in enacting Section 2(b) of the Robinson-Patman Act (15 U.S.C. § 13(b)).

STATEMENT OF THE CASE

On September 3, 1974, Shell brought suit in the Circuit Court for Anne Arundel County, Maryland, challenging the validity of Chapter 854 of the Laws of Maryland 1974, as amended. Similar suits were filed by Exxon Corporation, Continental Oil Company and its subsidiary Kayo Oil Company, Gulf Oil Corporation, Phillips Petroleum Company, Ashland Oil Company, and Commonwealth Oil Refining Company and its subsidiary Petroleum Marketing Corporation. All of these actions were consolidated in the Circuit Court for Anne Arundel County.

In their complaints, Shell and other plaintiffs challenged the "voluntary allowance" provision of Paragraph D of Chapter 854 as in conflict with the Robinson-Patman Act.[2] On May 29, 1975 Shell filed a motion for partial summary judgment seeking, *inter alia*, a declaration that by requiring a supplier "to extend all voluntary allowances uniformly to all retail service station dealers supplied," rather than permitting a supplier to limit such

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[2] Shell and other plaintiffs also challenged those provisions of Chapter 854 which prohibited the opening and operation of retail service stations by producers and refiners of petroleum products as, *inter alia*, denying due process of law in violation of the Maryland Constitution and the fourteenth amendment of the United States Constitution, and as constituting an undue burden of interstate commerce in violation of the Commerce Clause of the United States Constitution. While not pursued in this appeal (Shell's one formerly company-operated station in Maryland is now dealer-operated), Shell remains firmly convinced that such additional constitutional issues are substantial in nature and that the Maryland Court of Appeals erred in reversing the trial court on such issues.

allowances to individual competitive situations, Paragraph D was in conflict with the Robinson-Patman Act. Exxon and Gulf also filed similar motions. In support of its motion, Shell established, *inter alia*, that it sells gasoline to approximately 196 independent service station dealers located in Maryland. In supplying these service station dealers, Shell has granted voluntary competitive allowances whereby Shell grants temporary price reductions to Shell dealers suffering business losses from local competitive price reductions of competing retailers which are subsidized by their supplier(s). The price reductions granted by Shell are limited to a specific geographic area or "trade area(s)," in which an assessment by Shell shows that competitive marketing conditions are substantially the same and where all of its service station dealers have exposure to substantially the same retail customers. To the extent necessary to avoid competitive injury, allowances in appropriate lesser amounts are also given to Shell dealers in adjoining trade areas, thereby "feathering" out the reduction. *See FTC* v. *Sun Oil Co.*, 371 U.S. 505, 527-28 n.17 (1963).

In a Memorandum opinion dated October 14, 1975, the trial court granted Shell's motion, holding Paragraph D in irreconcilable conflict with the Robinson-Patman Act. The court stated:

> Literal enforcement of paragraph D in matters of price allowances would place the plaintiffs in jeopardy of violation of the Robinson-Patman Act passed by the Congress of the United States in 1936 in an attempt to foster fair competition in interstate commerce.
>
> • • •
>
> Moreover, paragraph D would have the effect of depriving the plaintiffs in Maryland of absolute defense afforded them by sub-section 2(b) of 15 US Code §§ 13-13B, 21a (1952) when plaintiffs are alleged

> to have discriminated in price between different purchasers of commodities of like grade and quality.
>
> • • •
>
> This court finds that the risk of conflict in attempted compliance by the plaintiffs with paragraph D is all apparent, and that this paragraph, would of necessity, foster the lack of lawful competition within the State to the detriment of the consumer. It therefore finds that in obstructing the accomplishment and execution of the full purposes and objectives of an Act of Congress of the United States paragraph D is invalid under the preemption doctrine. *Hines* v. *Davidowitz*, 312 U.S. 52.

(App. C 50a-51a.)

After trial on the remaining issues, the court issued an opinion finding for plaintiffs and reaffirming its previous decision striking Paragraph D as in conflict with the Robinson-Patman Act. (App. D 121a.) Defendants' appeal was taken to the Court of Appeals of Maryland when that court issued a writ of certiorari to the Maryland Court of Special Appeals prior to a decision by the intermediate court. In an opinion filed February 18, 1977, the Maryland Court of Appeals reversed the trial court, rejecting each of the constitutional grounds reiterated by Shell and other plaintiffs on appeal. With respect to Paragraph D, the Maryland Court of Appeals specifically held that "Paragraph D of the Maryland Act is not invalid under the Supremacy Clause of the United States Constitution." (App. A 41a.)

On March 15, 1977, and pursuant to Rule 850 of the Maryland Rules, Shell filed with the Maryland Court of Appeals a timely Motion for Reconsideration and a Motion for Stay of Mandate, arguing, *inter alia*, that the court had misconstrued applicable federal authorities in finding no conflict between Paragraph D and the Robinson-Patman Act. On April 13, 1977, the Court of Appeals

denied Shell's Motions for Reconsideration and Stay of Mandate and issued its mandate. (App. B 45a). This appeal followed.

SUMMARY OF ARGUMENT

Shell's appeal in this case is limited to the contention that Paragraph D of Chapter 854 is in basic, irreconcilable conflict with the Robinson-Patman Act. It is Shell's contention that the "meeting competition defense" of Section 2(b) is a complete and absolute defense to price discrimination created when Shell grants a "competitive allowance" whereby Shell reduces its price to Shell service station dealers to meet a price cut by a competing supplier to that supplier's dealers. In an effort to save Paragraph D, the Maryland Court of Appeals rejected Shell's contention and held that Section 2(b) does not encompass Shell's granting such competitive allowances. The Maryland court's construction of Section 2(b) "resolves" the question specifically reserved by this Court in *FTC* v. *Sun Oil Co.*, 371 U.S. 505 (1963), and is directly contrary to the construction given Section 2(b) by the lower federal courts and relevant federal agencies.

Properly construed, Section 2(b) encompasses the granting of price reductions (competitive allowances) for the purpose of meeting a price cut by a competitive supplier to that supplier's dealers. So construed, there is a twofold irreconcilable conflict between Section 2(b) and Paragraph D.

First, Section 2(b) requires that price reductions granted to meet competition be limited to a specific competitive situation. In contrast, under Paragraph D Shell is required to extend a competitive allowance to all Shell dealers in Maryland whenever it grants such an allowance to any dealer. Paragraph D thereby requires Shell to discriminate in price beyond that necessary to meet

the lower price of a competing supplier. The Maryland court chose to ignore the fact that the extension of the lower price beyond the area necessary to meet competition creates a price difference between prices charged in Maryland and prices charged elsewhere. Where the effect of the extension of the lower price "may be substantially to lessen competition," the price differences are *prima facie* violative of Section 2(a) of the Robinson-Patman Act and are not protected by Section 2(b) because the statewide lower price creates price differences which are not confined to the initial area necessitating the price reduction. Accordingly, compliance with Paragraph D requires Shell to violate Section 2(a) of the Robinson-Patman Act without the protection of Section 2(b).

Second, Paragraph D interferes with the accomplishment and execution of the full purposes and objectives of Congress in enacting Section 2(b). Section 2(b) guarantees to a seller an absolute pro-competitive right of self-defense to meet the equally low price of its competitor. By requiring a seller to grant the same competitive allowance to all the seller's dealers in Maryland whenever the seller grants such an allowance to any dealer, Paragraph D forces a seller to make the ruinous choice between 1) not meeting an equally low price of a competitor in a localized area and losing sales as its dealers lose sales, switch to other suppliers, or go out of business or 2) meeting localized competition but suffering the ruinous consequences arising from having to extend the same lower price to all dealers statewide. The Maryland court failed to recognize that this Hobson's choice effectively deprives a seller of the right to meet the equally low price of a competitor and results in the destruction of price competition among gasoline sellers in Maryland. Since this Court has held Section 2(b) was designed to avoid precisely these results, Paragraph D obstructs the purposes and policies of Congress in enacting Section 2(b).

THE FEDERAL QUESTIONS ARE SUBSTANTIAL

Shell's appeal to this Court is based on the contention that Paragraph D of Chapter 854 of the Laws of Maryland 1974 is in conflict with the federal Robinson-Patman Act and is thus void under the Supremacy Clause of the United States Constitution. Shell's appeal brings before this Court a longstanding, fundamentally important question involving the proper interpretation and construction of the "meeting the equally low price of a competitor" defense of Section 2(b) of the Robinson-Patman Act. In an ill-advised effort to save Paragraph D from conflict with the Robinson-Patman Act, the Maryland Court of Appeals misconstrued the fundamental scope and nature of the Section 2(b) defense. Properly construed, Section 2(b) requires that Paragraph D be voided under the Supremacy Clause.

A. The Maryland Court of Appeals' Construction of Section 2(b) of the Robinson-Patman Act Is Contrary to the Decisions of the Federal Courts and to the Stated Policy of the Federal Trade Commission and the United States Department of Justice

1. *The Supreme Court Decisions in* Standard Oil *and* Sun Oil

The questions presented in this appeal are directly intertwined with Section 2(b) of the Robinson-Patman Act, which provides that a seller can rebut a *prima facie* case of price discrimination violative of the Act "by showing that his lower price . . . to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor." This Court has addressed the nature and scope of the Section 2(b) defense in *Standard Oil Co.* v. *FTC*, 340 U.S. 231 (1951), and *FTC* v. *Sun Oil Co.*, 371 U.S. 505 (1951). These holdings provide the framework for the questions presented.

In *Standard Oil* the Federal Trade Commission brought suit against Standard alleging, *inter alia*, that by lowering its price to selected Standard wholesalers or "jobbers" for the purpose of meeting the lower price offered to those individual jobbers by competitors of Standard, Standard had discriminated in price in violation of Section 2(a) of the Robinson-Patman Act. Standard maintained that the price discrimination was justified under the "meeting the equally low price of a competitor" defense of Section 2(b), notwithstanding any competitive injury that non-favored jobbers may have suffered. The Commission rejected this defense and was affirmed by the Court of Appeals for the Seventh Circuit. *Standard Oil Co.* v. *FTC*, 173 F.2d 210 (7th Cir. 1949). This Court reversed.

Before this Court, the Commission argued that Section 2(b) did not provide a defense where the harm to competition at the customer level was so great that it outweighed the benefit to competition at the seller's level that flowed from the seller's ability to meet the equally low price of its competitor. This Court rejected this balancing test, holding that a seller has an absolute right under Section 2(b) to meet the equally low price of a competitor regardless of its competitive impact. (340 U.S. at 250-51.) Since *Standard Oil*, this Court and the lower federal courts have uniformly adhered to this rule. *See, e.g.*, *FTC* v. *Sun Oil Co.*, 371 U.S. 505, 514 (1963); *Tri-Valley Packing Association* v. *FTC*, 329 F.2d 694, 704 (9th Cir. 1964); *Hanson* v. *Pittsburgh Plate Glass Industries, Inc.*, 482 F.2d 220, 226 (5th Cir. 1973), *cert. denied*, 414 U.S. 1136 (1974).

This Court's second major review of Section 2(b) was in *Sun Oil*. Sun was an integrated refiner and distributor of gasoline that distributed gasoline through independent retail service station operators. Super Test, a retail service station chain, opened a station across the street from a Sun dealer, McLean, and undersold him. To help

McLean meet price competition from Super Test, Sun lowered its gasoline price to him but refused to grant similar allowances to other Sun dealers in the area. Those dealers complained to the Federal Trade Commission and the Commission issued a complaint against Sun, charging price discrimination in violation of Section 2(a) of the Robinson-Patman Act. In defense, Sun invoked the "meeting the equally low price of a competitor" defense of Section 2(b) of the Act. The Federal Trade Commission found that Sun had not attempted to meet a price cut originated by its own competition—another wholesale supplier; Sun had granted an allowance to one of its dealers to help him meet a price cut made by his competition—a competing service station. Consequently, the Federal Trade Commission rejected Sun's use of the Section 2(b) defense "because Sun was not meeting its own competition". (371 U.S. at 510.)

In affirming the Commission, this Court noted that "[t]he only issue thus before the Court is whether Sun is here entitled to avail itself of the § 2(b) defense that its . . . 'lower price' to McLean was extended 'in good faith to meet an equally low price of a competitor.'" (371 U.S. at 511.) In resolving that issue, the Court disregarded as not founded on evidence of record the lower court's assumption that Super Test was an integrated supplier-retailer of gasoline and proceeded "on the assumption that Super Test was engaged solely in retail operations . . . [and that] Super Test was not the beneficiary of any enabling price cut from its own supplier." (371 U.S. at 512.) The Court thus addressed a set of facts in which Sun had lowered its price to a customer *not* to meet the lower price offered to that customer by a *competitor of Sun*, but to allow Sun's customer (McLean) to compete with its competitor, *i.e.*, the Super Test station across the street. In that situation, the Court held that Sun's price reduction could not be justified

under Section 2(b) because "the § 2(b) phrase 'equally low price of a competitor' would seem to refer to the price of a competitor of the seller who grants, and not of the buyer who receives, the discriminatory price cut. (In this case, this would mean a competitor of Sun, the refiner-supplier, and not a competitor of McLean, the retail dealer)." (371 U.S. at 514.)

The question unanswered directly by *Sun* and *Standard* is whether Section 2(b) encompasses a situation where a supplier such as Sun (or Shell) lowers its price to a retail dealer to enable the dealer to meet the lower price of a competing retail dealer which lower price is subsidized by a price reduction from that dealer's supplier. Indeed, in *Sun*, specifically reserving this question, this Court stated:

> Were it otherwise, *i.e.*, if it appeared either that Super Test were an integrated supplier-retailer, or that it had received a price cut from its own supplier—presumably a competitor of Sun—we would be presented with a different case, as to which we herein neither express nor intimate any opinion. (371 U.S. at 512 n.7.)

At a later point in the opinion, the Court again stated:

> In this posture of the case, we find it unnecessary to pass upon the Commission's apparently alternative theory that a lower competitive offer to McLean himself was a prerequisite to Sun's invocation of the § 2(b) defense. (371 U.S. at 529 n.19)

Following this Court's remand of *Sun* to the Court of Appeals for the Fifth Circuit, that court remanded the case to the Commission to determine whether Super Test's lower price was in fact subsidized by its supplier. *In re Sun Oil Co.*, 67 F.T.C. 341 (1965). While the issue was pending before the Commission, the proceeding was dismissed *sua sponte*. (67 F.T.C. at 367). It is the precise

question reserved in *Sun* which was explicitly decided by the Maryland Court of Appeals and which is squarely presented for review on this appeal.

2. *The Maryland Court's Resolution of the Question Reserved in* Sun *Is Contrary to All Existing Federal Authority*

The Maryland Court of Appeals held that Shell's granting competitive price assistance to meet a price cut of a competing supplier to that supplier's dealers is not protected by Section 2(b) of the Robinson-Patman Act because Section 2(b) applies only when the competitive offer is made directly to Shell's own customer. This holding resolves the question reserved in *Sun* in a manner contrary to all federal court authority as well as the stated policy of the Federal Trade Commission and the Department of Justice.

Shell's program of competitive allowances falls squarely within the scope of the question reserved by the Court in *Sun*. Shell grants price reductions to adversely affected Shell retail service station dealers where Shell has determined that a retail dealer of a competing brand is selling gasoline at a lower price than local Shell dealers and such retail dealer's lower price is subsidized by a price reduction from its supplier, who is a competitor of Shell. *See generally Gray* v. *Shell Oil Co.*, 469 F.2d 742, 747 (9th Cir. 1972), *cert. denied*, 412 U.S. 943 (1973). The Maryland Court of Appeals first correctly noted that *Sun* had "specifically reserved the question of whether the § 2(b) defense is available if the seller's discriminatory price cut to its dealer is in response to a price cut made by a competitor of the seller to the competitor's dealer." (App. A 36a.) Relying on the district court decision in *Enterprise Industries* v. *Texas Co.*, 136 F. Supp. 420 (D. Conn. 1955), *reversed on other grounds*, 240 F.2d 457 (2d Cir.), *cert. denied*, 353 U.S. 965 (1957), the

Maryland court then proceeded to "resolve" this question, ruling that Shell's granting competitive allowances to meet a price cut of a competing supplier to that supplier's dealers is not protected by Section 2(b) because "the § 2(b) defense is available only where the discriminatory price reduction is to meet the equally low price offered to *the same buyer* by a competing seller." (App. A 39a-40a; emphasis in original).

In contrast to the Maryland court's construction of Section 2(b), the established policy of the Federal Trade Commission, which has primary responsibility for enforcement of the Robinson-Patman Act, has been that a supplier is permitted by Section 2(b) to reduce its price to selected dealers to meet the price reduction by a competing supplier to that supplier's retail dealers. *See* Federal Trade Commission *Report on Anticompetitive Practices in the Marketing of Gasoline*, 3 CCH Trade Reg. Rep., ¶ 10,373 at 18,245 (1967). The Commission has stated:

> The nature of the distribution system in the petroleum industry is such that suppliers of gasoline normally do not compete with one another on sales to the same dealer. *That they are in competition with one another, however, is an undeniable fact.* In the actualities of competition in the marketing of gasoline, it is only by reducing its wholesale price that the supplier can respond defensively to another supplier's price cut which is reflected in the retail price at which that supplier's gasoline is sold. This is true whether the supplier who initiates the price cut is selling to lessee dealers or through retail outlets which it owns and operates. In either case the competing supplier who reduces its price to its customers which may enable them to post a competitive retail price is in fact acting in response to a price cut by its own competitor, a supplier, rather than by a competitor of its customer. *Consequently, we are of the opinion that a price reduction by one supplier to its*

> *customer which is reflected in the latter's retail price may be lawfully met by a comparable reduction by another supplier to its customer.* (*Id.*; emphasis supplied.)

More recently, the Department of Justice, which has coordinate authority to enforce the Robinson-Patman Act, affirmed the correctness of the Commission's position. *See* Department of Justice *Report on the Robinson-Patman Act* 93-97 (1977).

The position of the Maryland Court of Appeals is also contrary to federal court authority. *See Bargain Car Wash Inc.* v. *Standard Oil Co. (Indiana)*, 466 F.2d 1163, 1175-76 (7th Cir. 1972); *Belliston* v. *Texaco Inc.*, 455 F.2d 175, 182 (10th Cir.), *cert. denied*, 408 U.S. 928 (1972); *Covey Oil Co.* v. *Continental Oil Co.*, 340 F.2d 993, 997-998 (10th Cir.), *cert. denied*, 380 U.S. 964 (1965); *Bunty* v. *Shell Oil Co.*, 1972 Trade Cas. ¶ 74,252 (D. Nev. 1972).

In *Bargain Car Wash* the Court of Appeals for the Seventh Circuit, in an opinion by Mr. Justice Clark sitting by designation, and concurred in by Mr. Justice Stevens sitting then as circuit judge, directly confronted the issue left unresolved in *Sun*:

> In Sun Oil Company v. FTC, 371 U.S. 505, 83 S. Ct. 358, 9 L. Ed. 2d 466 (1963) the competitor of Sun's dealer had not received any support or allowance from its supplier to enable it to sell at reduced prices. The Court held that Section 2(b) did not afford Sun any protection. However, it specifically reserved decision where an allowance from Sun's competitor supplier was present. The Court had not had occasion to pass upon the question. Unfortunately, it faces us and effective administration requires that we answer it. *We are inclined to the view that the Section 2(b) defense is available to American if the lower price granted its individual dealer is made to meet an equally low price made by a competitor of American to an individual competitor of American's dealer.* (466 F.2d at 1175; emphasis supplied.)

The Maryland Court's reliance on the district court's opinion in the *Enterprise* case is also misplaced. The district court in *Enterprise* held that Section 2(b) does not permit a seller to discriminate in price in order "to enable a *buyer* to meet price competition, but only to enable the seller to meet a lawful price of the *seller's* competitor." (136 F. Supp. at 421; emphasis in original.) Although the precise factual situation involved in *Enterprise* is unclear, the district court apparently was faced with a situation where the lower price of the competing retail dealer was unsupported by a price cut by the dealer's supplier—precisely the situation presented by the record in *Sun*. The district court's decision was so construed in *Sun* where this Court noted that "[t]he precise question has not heretofore been resolved by this Court. The only reported judicial decision (other than that of the Court of Appeals in this case) considering the issue is a District Court opinion supporting the view of the Commission [citing *Enterprise*]." (371 U.S. at 512.) This Court's reading of *Enterprise* as limited to the "precise" issue resolved in *Sun* is reinforced by an identical reading of *Enterprise* by the Federal Trade Commission in Congressional hearings in 1955 and 1956. *See* Hearings Before a Senate Subcommittee of the Select Committee on Small Business on a Study of Petroleum Marketing Practices in New Jersey, 84th Cong., 1st & 2d Sess., pt. 3 at 449-51 (1955-1956).

Contrary to the Maryland court's assertion, the district court's decision in *Enterprise*, which was eight years before this Court's decision in *Sun*, did *not* decide the question left unresolved by this Court in *Sun*. Accordingly, the Maryland court's construction of the scope of the Section 2(b) defense is not only contrary to the established

policy of the Federal Trade Commission and Department of Justice and the decisions of the federal courts, but is completely lacking any support in the case law.

B. Compliance With Paragraph D Exposes a Seller to Liability Under Section 2(a) of the Robinson-Patman Act

In contrast to Shell's practice of tailoring price assistance to a particular competitive situation, Paragraph D requires Shell to grant the same competitive allowance to 196 Shell dealers located throughout Maryland whenever Shall grants a competitive allowance to any dealer. Such an extension is required by Paragraph D even though the particular competitive situation giving rise to the need for a competitive allowance may be limited to a single customer or trade area. Paragraph D thereby compels Shell to grant price reductions which are *prima facie* violative of Section 2(a) and not protected by Section 2(b). As a result, Shell is exposed to Robinson-Patman Act liability on both the primary-line and secondary-line levels of competition.

Under Section 2(a) of the Robinson-Patman Act, a seller who discriminates in price is liable in treble damages for any competitive injury proximately caused to (1) the seller's own competitors (primary-line); (2) disfavored customers that compete with the seller's favored customers (secondary-line); (3) the customers of the disfavored purchasers (tertiary-line); and (4) any person positioned further down the distribution chain. *See, e.g., Perkins* v. *Standard Oil Co.*, 395 U.S. 642 (1969); *Utah Pie Co.* v. *Continental Baking Co.*, 386 U.S. 685 (1967); *FTC* v. *Anheuser-Busch, Inc.*, 363 U.S. 536 (1960); *FTC* v. *Morton Salt Co.*, 334 U.S. 37 (1948).

In *FTC* v. *Anheuser-Busch, Inc.*, 363 U.S. at 549, the Court held that "price discrimination" for purposes of Section 2(a) of the Robinson-Patman Act "is merely a

price difference." This Court further held that price differences between widely separated territories (territorial price discrimination) could constitute a primary-line violation of Section 2(a) "even though secondary-line and tertiary-line competition are unaffected." (363 U.S. at 542-43.) Such price differences are also actionable on the lower levels of competition. *See, e.g., Perkins* v. *Standard Oil Co.*, 395 U.S. at 648; *FTC* v. *Morton Salt Co.*, 334 U.S. at 45. "Sellers may not sell like goods to different purchasers at different prices if the result may be to injure competition in either the sellers' or the buyers' market unless such discriminations are justified as permitted by the Act." *Utah Pie Co.* v. *Continental Baking Co.*, 386 U.S. at 702.

An important justification for price discrimination is the seller's absolute right, under Section 2(b), to rebut a *prima facie* violation of Section 2(a) by showing that his "price difference" was a good faith effort to meet the lower price of a competitor. The Court, however, has ruled that Section 2(b) justifies only a price reduction tailored to the individual competitive situation presented. In *FTC* v. *A. E. Staley Manufacturing Co.*, 324 U.S. 746, 753 (1945), this Court stated that "the Act . . . places emphasis on individual competitive situations, rather than upon a general system of competition." In *FTC* v. *National Lead Co.*, 352 U.S. 419, 431 (1957), this Court said: "The section is designed to protect competitors in individual transactions." And in *Sun* this Court specifically recognized that "the proviso permits the seller to meet the price actually previously offered by a local competitor. It permits him to go no further." 371 U.S. at 517, *quoting*, H.R. Rep. No. 2287, 74th Cong., 2d Sess. 16 (1936).[3]

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[3] Decisions by the lower federal courts have strictly adhered to this interpretation. *See Continental Baking Co.* v. *Old Homestead Bread Co.*, 476 F.2d 97, 107-08 (10th Cir.), *cert. denied*, 414 U.S. 975 (1973); *Surprise Brassiere Co.* v. *FTC*, 406 F.2d 711, 714-15

Compliance with Paragraph D gives rise to potential primary-line liability because it results in a territorial price discrimination between the price charged by Shell to dealers in Maryland and the price charged by Shell to dealers in adjoining states. Should such territorial discrimination threaten to injure competition among sellers in Maryland or elsewhere, Shell would be exposed to primary-line liability under Section 2(a) of the Robinson-Patman Act. *See Utah Pie Co.* v. *Continental Baking Co.*, 386 U.S. at 702-03; *Holleb & Co.* v. *Produce Terminal Cold Storage Co.*, 532 F.2d 29, 34-35 (7th Cir. 1976). If the competitive problems presented by a local competing supplier's price cut were limited to a single area, the extension of the price reduction statewide in compliance with Paragraph D would create price discriminations *prima facie* violative of Section 2(a). These price discriminations would not be protected by Section 2(b) because the statewide extension would not be tailored to the individual competitive situation. *See In re Forster Manufacturing Co.*, 62 F.T.C. 852, 911-15 (1963), *rev'd and remanded*, 335 F.2d 47, 54-56 (1st Cir. 1964), *cert. denied*, 380 U.S. 906 (1965), *upon remand*, 68 F.T.C. 191, 198 (1965), *aff'd*, 361 F.2d 340 (1st Cir. 1966), *cert. denied*, 385 U.S. 1003 (1967); *Hampton* v. *Graff Vending Co.*, 478 F.2d 527, 534-35 (5th Cir.), *cert. denied*, 414 U.S. 859 (1973). Only by limiting the amount and geographic scope of competitive allowances to the amount and geographic scope of a competing sup-

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(5th Cir. 1969); ***Exquisite Form Brassiere, Inc.*** v. ***FTC***, 360 F.2d 492, 493 (D.C. Cir. 1965), ***cert. denied***, 384 U.S. 959 (1966); ***Tri-Valley Packing Association*** v. ***FTC***, 329 F.2d 694, 706 (9th Cir. 1964); ***Standard Motor Products, Inc.*** v. ***FTC***, 265 F.2d 674, 677 (2d Cir.), ***cert. denied***, 361 U.S. 826 (1959). ***See generally*** Kuenzel & Schiffres, ***Making Sense of Robinson-Patman: The Need to Revitalize Its Affirmative Defenses***, 62 Va. L. Rev. 1211, 1244 (1976); F. Rowe, ***Price Discrimination Under the Robinson-Patman Act*** 249 (1962); ***Report of the Attorney General's National Committee to Study the Antitrust Laws*** 184 (1955).

plier's price reduction can a seller such as Shell avoid the potential for Robinson-Patman Act primary-line liability. This limitation is precluded by Paragraph D.

In addition to primary-line liability, compliance with Paragraph D exposes Shell to potential secondary-line liability. While Paragraph D requires that all Shell dealers in Maryland receive the same competitive price assistance, Shell would be exposed to secondary-line liability at the boundaries of Maryland, where Maryland dealers are in competition with Shell dealers located in neighboring jurisdictions such as the District of Columbia, Delaware or West Virginia. To avoid secondary-line injury, Shell would be required to extend a lower price to Shell dealers located in these bordering jurisdictions. For a discussion of such secondary-line liability, see *In re Forster Manufacturing Co.*, 62 F.T.C. at 915.

The Maryland court sought to avoid these problems of liability by holding that Section 2(b) does not protect price discriminations created by competitive allowances. If, however, the Maryland court is in error in its resolution of the question reserved in *Sun*, and Section 2(b) does protect a seller such as Shell from Section 2(a) liability when the price reduction to a retail service station dealer is limited to the individual competitive situation presented, the statewide extension of competitive allowances required by Paragraph D exposes the seller to both primary-line and secondary-line liability. This Court is thus confronted with the question reserved in *Sun*.

C. Paragraph D Stands as an Obstacle to the Accomplishment and Execution of the Full Purposes and Objectives of Congress in Enacting Section 2(b) of the Robinson-Patman Act

In *Standard*, the Court held that Section 2(b) of the Robinson-Patman Act guarantees and preserves to a seller a fundamental, pro-competitive right of self-defense to

meet competition. This holding is in full accord with congressional intent. As this Court stated in *Standard*:

> We need not now reconcile, in its entirety, the economic theory which underlies the Robinson-Patman Act with that of the Sherman and Clayton Acts. *It is enough to say that Congress did not seek by the Robinson-Patman Act either to abolish competition or so radically to curtail it that a seller would have no substantial right of self-defense against a price raid by a competitor.* (340 U.S. at 249; emphasis supplied.)

The seller's right to meet competition under Section 2(b) not only applies to competition for old customers but also to competition for new customers as well. *See, e.g., Cadigan* v. *Texaco Inc.*, 492 F.2d 383, 387 (9th Cir. 1974); *Sunshine Biscuits, Inc.* v. *FTC*, 306 F.2d 48, 52 (7th Cir. 1962).

The meeting competition defense of Section 2(b) also embodies the congressional purpose of fostering and encouraging price competition among sellers by providing the vital link between the Robinson-Patman Act and the Sherman Act. As this Court stated in *Sun*, the Section 2(b) defense, as properly limited to instances where the seller is meeting the competition of its own competitors, "comports . . . not only with the objectives of the Robinson-Patman Act *but with the general antitrust policy of preserving the benefits of competition.*" (371 U.S. at 522; emphasis supplied.) *Cf. Fairmont Creamery Co.* v. *Minnesota*, 274 U.S. 1, 8-9 (1926); *State of New York* v. *Mobil Oil Corp.*, 38 N.Y.2d 460, 463-64, 381 N.Y.S.2d 426, 428-29, 344 N.E.2d 357, 359-60 (1976). The pro-competitive purposes underlying Section 2(b) were clearly recognized in *Standard* where the Court noted the "effectiveness and value" (340 U.S. at 247) of the Section 2(b) defense and that the right to meet competition was "guaranteed by statute and could not be curtailed by any

mandate or order of the Commission." (340 U.S. at 247 n.12, *quoting*, Senate Select Temporary National Economic Committee, 76th Cong., 3d Sess., Investigation of Concentration of Economic Power, Monograph No. 42, *The Basing Point Problem* 139 (Comm. Print 1941)).

Contrary to congressional intent, Paragraph D destroys competition and the guaranteed right to meet the equally low price of a competitor by forcing Shell to make the ruinous choice of (1) not reducing its price to particular Shell dealers adversely affected by a competing supplier's reduction of price to its local dealers and having those Shell dealers lose sales of Shell gasoline, switch to other suppliers, or go out of business or (2) meeting the competing supplier's lower price but suffering ruinous consequences by having to extend the same lower price to all 196 Shell dealers in Maryland. This Hobson's choice destroys the right to be competitive. It also destroys price competition among sellers. As stated in the Attorney General's Report on the Antitrust Laws:

> For a seller constrained by law to reduce prices to *some* only at the cost of reducing prices to *all* may well end by reducing them to *none*. [Emphasis in original.] As the Federal Trade Commission recently recommended to Congress, 'the right to meet a lower price which a competitor is offering to a customer, when this is done in good faith, *is the essence of competitive economy.' Anything less, we think, would move the price discrimination statute into irreconcilable conflict with the Sherman Act.* (*Attorney General's National Committee to Study the Antitrust Laws* 181 (1955); emphasis supplied.)

In *Standard*, the Court explicitly rejected any interpretation of Section 2(b) which would lead to this Hobson's choice, stating:

> There is nothing to show a congressional purpose . . . to compel the seller to choose only between ruinously cutting its price to all its customers to match the

> price offered to one, or refusing to meet the competition and then ruinously raising its price to its remaining customers to cover increased unit costs. There is, on the other hand, plain language and established practice which permits a seller, through 2(b), to retain a customer by realistically meeting in good faith the price offered to that customer, without necessarily changing the seller's price to its other customers. (340 U.S. at 250.)

In essence, "[w]ere it not for this provision, the Robinson-Patman Act would have thwarted the Sherman Act objective of fostering price competition and price flexibility." ABA, *Antitrust Law Developments* 143 (1975). *See also United States* v. *United States Gypsum Co.*, 550 F.2d 115, 124 (3d Cir. 1977).

When faced with this conflict between the purposes underlying Section 2(b) and the requirements of Paragraph D, the Maryland court simply held that there was no conflict because Section 2(b) did not permit a seller to grant competitive price allowances. (App. A 40a.) The Maryland court's "resolution" of the conflict between Section 2(b) and Paragraph D not only decides the question reserved by this Court in *Sun* in a manner completely at odds with prevailing federal authority and the congressional purposes inherent in Section 2(b), but also ignores the basic principle that both fairness and a competitive economy require that a seller be permitted to meet the equally low price of its competitor. As this Court noted in *Sun*:

> Restriction of the [§ 2(b)] defense to those situations in which a supplier responds to the price concessions of its own competitor—another supplier—maintains general competitive equities. *Fairness demands neither more nor less.* (371 U.S. at 522-23; emphasis supplied.)

If the Maryland court's construction of Section 2(b) is allowed to stand, the right to compete will be nullified and price competition among sellers will be very severely restricted.

D. The Questions Presented Are of Nationwide Significance

The questions presented on this appeal place before this Court the issue it reserved in *Sun*. Resolution will entail a review of the scope and nature of Section 2(b). Like *Sun*, this case is "one of far-reaching importance in the administration of the Robinson-Patman Act." (371 U.S. at 530; Harlan, J., concurring).

The importance of the conflict between Paragraph D of the Maryland Act and Section 2(b) of the Robinson-Patman Act is magnified in that the State of Delaware and the City Council of the District of Columbia have already enacted laws with provisions nearly identical to Paragraph D, while California and Rhode Island have enacted legislation with a similar purpose and effect.[4] In addition, in the last three years, similar legislation has been introduced in at least 16 other states.[5]

Summary reversal of this appeal would be appropriate in view of the well-established federal authority which has construed Section 2(b) in a manner contrary to the Maryland court's interpretation. Summary dismissal would not only overrule a long list of federal court deci-

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[4] Del. Code Annot. title 6, § 2906 (Supp. 1976); D.C. Law 1-123, § 3-103, 23 D.C. Register 5900, 5912 (Feb. 11, 1977); Cal. Bus. & Prof. Code § 21200 (Deering 1976); R.I. Gen. Laws § 5-55-5 (Supp. 1976).

[5] Alabama (H.B. 511); Colorado (H.B. 1455); (H.B. 1713); Connecticut (H. 8257); Georgia (H.B. 78); Illinois (H.B. 1993); Indiana (H.B. 2084); Kansas (S.B. 84); Massachusetts (H. 6381); Maine (L.D. 972, L.D. 1052); Missouri (H.B. 422); Nevada (A.B. 645); New Hampshire (H.B. 8680, S. 75); Pennsylvania (S.B. 858, H.B. 1684); Tennessee (H.B. 718, H.B. 713, S.B. 580); Vermont (H. 363); West Virginia (H.B. 1245, S.B. 422).

sions, but would also nullify the stated policies of the Federal Trade Commission and the Department of Justice and allow the Maryland court to decide a federal question which this Court expressly reserved in *Sun*. *See Hicks* v. *Miranda*, 422 U.S. 332, 343-45 (1975). So important a decision should not be taken without the benefit of full briefs on the merits and oral argument.

CONCLUSION

For all the foregoing reasons, the questions presented to the Court on this appeal are so substantial as to require plenary consideration, with briefs on the merits and oral argument, for their proper resolution.

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